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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re ELIAS D., a Person Coming Under
the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

EDNA R.,

Defendant and Appellant.

D044644

(Super. Ct. No. SJ10906)

APPEAL from an order of the Superior Court of San Diego County, William E. Lehnhardt, Judge. (Retired Judge of the Imperial Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Edna R. appeals the juvenile dependency court's 18-month review order placing her son, Elias D., with his presumed father, Shelby D. She contends the order is unsupported by substantial evidence; instead, substantial evidence supports a finding it would be detrimental to place Elias with Father and the court abused its discretion by not making such a finding. We affirm.

BACKGROUND

In November 2002, when Elias was six and one-half years old, the San Diego County Health and Human Services Agency (the Agency) filed a dependency petition because Edna R. hit him with a belt, bruising his neck and arm; used methamphetamine and failed to comply with drug-related services; and Shelby had not protected him. At the time the petition was filed, Shelby's whereabouts were unknown. Elias was detained with his maternal grandmother, Edna M., then placed with her. She wanted to adopt him if Edna R. did not reunify.

At the June 29 and 30, 2004 18-month review hearing, the court found returning Elias to Edna R. would create a substantial risk of detriment to his physical and emotional well-being but it would not be detrimental to place him with Shelby. It stated that while Shelby worked a lot and attended school, so it was unclear how much time he would have for Elias, he was "a perfectly adequate father"; the main reason for Elias's stated desire to stay with Edna M. was his unrealistic hope that Edna R. would "get her act together and be a parent"; and the best chance for Elias's success lay in placement with Shelby. The court accordingly placed Elias with Shelby.

DISCUSSION

At the 18-month review, hearing, "[t]he court shall order the return of the child to the physical custody of his or her parent . . . unless the court finds, by a preponderance of the evidence, that the return . . . would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child. The social worker shall have the burden of establishing that detriment. The failure of the parent . . . to participate regularly and make substantive progress in court-ordered treatment programs shall be prima facie evidence that return would be detrimental. In making its determination, the court shall review and consider the social worker's report . . . ; shall consider the efforts or progress, or both, demonstrated by the parent . . . and the extent to which he or she availed himself or herself of services provided. . . ." (Welf. & Inst. Code, § 366.22.)¹

"We determine whether substantial evidence supports the juvenile court's findings." (*Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322, 1341.) The application of this standard requires us to view the record in the light most favorable to the juvenile court's order. (*In re Shelley J.* (1998) 68 Cal.App.4th 322, 329.)

Edna R. contends the evidence fails to support a finding there was no risk of detriment in placing Elias with Shelby; substantial evidence supported a finding it would

¹ Statutory references are to the Welfare and Institutions Code.

be detrimental to place Elias with Shelby; and the placement order conflicted with Elias's best interests.² None of these assertions is valid.

When Elias was born, Shelby was 15 years old and living with Edna R. in Edna M.'s home. Shelby and Edna R. separated when Elias was still an infant. Edna M. claimed that when Elias was two years old, Shelby was physically and verbally aggressive with her and with Edna R. Shelby lost touch with Elias when he was three or four years old and had no contact with him for three years, until after the filing of the dependency petition. Elias believed that Roman C., the alleged father of his half-brothers, was his father.

By May 2003, the Agency had found Shelby. He lived in San Diego County with his girlfriend who was a full time homemaker and caretaker of their two children. He said Edna R. had alienated Elias from him. He claimed he had tried to become involved in Elias's life but could not explain why he had not sought visitation or custody through family court. He wanted Elias to be placed with him. He had stable employment and housing. He also had a history of drug use and crime,³ the last incident being an October 2001 conviction of felony possession of drugs for sale and misdemeanor driving under

² Elias's trial counsel asked that Elias not be placed with Shelby, a section 366.26 hearing be set, and in the interim, that visitation be increased, giving Shelby the opportunity to get to know Elias better and make more time for him, and allowing Elias to make the transition into Shelby's home. Elias's appellate counsel agrees with the Agency's counsel that substantial evidence supports the juvenile court's findings and orders.

³ The record does not reveal the specifics of this history.

the influence. He was on formal probation until October 2002, when he was placed on summary probation.⁴

Shelby eventually entered adult school to obtain his GED and applied for a higher paying job with benefits. He took significant time off work to comply with his reunification plan and made substantive progress. He attended individual therapy and submitted to random drug testing. Sometime in 2003, he began conjoint therapy with Elias and Elias's therapist. He demonstrated a willingness to establish a relationship with his son and was open and receptive to therapy. According to Shelby's therapist, he had taken responsibility for his problems, had benefited from therapy, and was ready and eager to have Elias placed with him. Shelby and Elias began developing a father-son relationship through visits that progressed from the therapeutic setting, to supervised visits at a family fun center, to unsupervised visits, to two overnight visits. Elias appeared stable after visits and seemed to enjoy the overnight visits. Shelby visited consistently but complained that Edna R. and Edna M. pressured Elias to refuse visits and tried to interfere with visitation.

Before his first meeting with Elias, Shelby discussed with his own therapist "ways to approach his son that would not be upsetting or traumatic [and] asked questions about the effects that their separation had on [Elias]." During conjoint sessions, Elias asked

⁴ According to the social worker's six-month review report, the probationary period was set to expire in October 2005. According to the social worker's 12-month review report, Shelby was in compliance with the terms of his probation. On June 30, 2004, Shelby testified that he was "not to his knowledge" still on probation.

Shelby about his absence and expressed his feelings of anger and hurt and they discussed Elias's concerns about living with Shelby. Shelby's therapist reported Shelby was respectful of Elias's feelings and concerned for his physical and emotional welfare, "placed Elias'[s] emotional well being above his own desire to reconnect with his son[,] and [was] patient while this process evolve[d]." Despite strained relations with Edna R. and her family, Shelby was willing to maintain their involvement in Elias's life. Shelby told Elias he would never keep him away from Edna M. or his half-brothers.

Shelby's therapist, who had observed him and his girlfriend with their two young children and had spoken with the social worker and Elias's therapist, was unaware of any protective issue that would preclude Elias's placement with Shelby and his family. She had no concern about Shelby's ability to care for and protect Elias. Although he had a recent positive test for marijuana, he admitted it was a bad choice, made no excuses, and discussed with his therapist alternative ways of reducing stress.

Elias's therapist reported that Shelby's interactions with Elias were appropriate, Shelby validated Elias's feelings, and Elias said he felt safe with Shelby. The therapist had not observed any risk in Shelby's interaction with Elias. Elias was worried, however, about losing contact with his maternal family if he lived with Shelby and losing contact with Shelby if he lived with Edna M. He also said if he lived with Shelby he would miss his neighborhood friends and did not know whether there would be a bed for him.⁵

⁵ Shelby originally lived with his girlfriend, their two children, and his mother in a one-bedroom trailer. On his overnight visits, Elias slept on a mattress in the living room. By May 2004, Shelby's mother had moved out. Shelby planned to buy bunk beds and

Elias's therapist believed he would "highly benefit from a prompt decision [about his permanent placement] since he remain[ed] anxious about the outcome of his living situation." She also believed he should continue to have contact with Shelby if he lived with Edna R. and that it was crucial that he continue to have contact with Edna M.

The social worker believed there would be no detriment in placing Elias with Shelby and recommended that placement. While Shelby had not participated in Elias's school activities,⁶ he was very sensitive to Elias's need to continue his contact with the maternal side of Elias's family and intended to follow through with Elias's therapy. The social worker believed that Elias would be "fine" moving from Edna M.'s home to Shelby's. Elias was not fragile, although he was shy and sometimes appeared hesitant to talk. Elias's teacher described him as reserved, a follower who did not want to "rock the boat" and preferred to give a "middle road type of answer," rather than "yes" or "no," to avoid upsetting people. Elias's therapist said Elias was hesitant to disclose information to the social worker because he was afraid of Edna M.

The social worker believed there would be an emotional risk to Elias if he remained with Edna M., in view of a taped message to Shelby she had heard a couple of weeks before the June 2004 hearing. In the message, Edna M. and Edna R. yelled at

rearrange the living room as a bedroom with a day bed, dresser, and desk for Elias's computer. By the time of the hearing, Shelby was in the process of renting a two- or three-bedroom apartment.

Elias and spoke in a hostile, loud, aggressive manner. Edna R. told Elias to "leave a fucking message" for Shelby saying he did not want to visit and Edna M. called Elias "stupid." Elias responded in a meek, quiet tone of voice, saying "yes" and "no" and agreeing. It sounded as though he was crying.⁷

Elias, who was eight years old at the time of the hearing, testified the visits with Shelby were "okay," but he did not feel comfortable spending the night with Shelby because he liked sleeping "at my own house." It worried him to spend the night at Shelby's home, because it felt as though he lived there. When Shelby picked him up for daytime visits, he felt "a little happy" and "a little sad"; once he arrived at Shelby's home, he felt happy. The Saturday before the hearing, they had a visit that was to last all day. When he arrived at Shelby's home, he told Shelby he wanted to spend the night. Shelby called Edna M., who gave her permission, which made Elias happy.⁸ Elias testified he liked hugging Shelby but was afraid of him and afraid to tell him "no." He testified that

⁶ Elias's teacher did not assign homework over weekends, when Shelby's visits took place. Shelby offered to help Elias with homework, but Elias always said he would do it on his own or with Edna M.'s help.

⁷ Elias testified he did not remember this telephone call.

This was just one instance of a possible violation of the court's order that Edna R. was not to live in Edna M.'s home and Edna M. was not to be the supervisor of Edna R.'s visits with Elias. The social worker characterized Edna R. as "extremely deceitful" and said Edna M. had a history of minimizing Edna R.'s behavior.

⁸ Shelby testified as follows concerning the visit: it was to be overnight, but Elias was acting shy and sad, and Shelby did not want to force him to spend the night. When Shelby said it was time for him to take Elias back if he wanted to go, Elias asked to stay. Shelby told him to call Edna M. and ask for permission. Elias did so, and spent the night.

Edna M. yelled at him and hit him with her hand, but he was not afraid of her, although he felt sad when she hit him.

On May 27, 2004, in the principal's office at school, Elias's attorney's assistant asked him to draw a picture of his family. He included Edna M., Edna R., Roman, and his half-brothers, all people who lived in or came to Edna M.'s house. On June 16, he wrote a letter saying he wanted to live with Edna R.'s or Edna M.'s family; he did not feel safe with Shelby; and he did not "want to go with people [he did not] know." Elias testified it was Edna M.'s idea for him to write the letter; the words were his own; and he wrote the letter at school, with his teacher helping with the spelling. Elias also testified, however, that the statement he did not feel safe with Shelby was Edna M.'s, not his; that it was half his, half hers; that he did not remember what he meant by the statement; and that Edna M. wanted him to live with her or with Edna R..⁹

Elias also said he wanted to live with Edna R. and Roman but was hesitant when he said so to the social worker. At trial, when asked if he felt differently than he had when he wrote the letter, he replied, "Um, no." He testified he would feel sad if he could not see Shelby.

Shelby testified Elias was shy at the beginning of unsupervised visits, but became less so as Shelby asked him about school and other matters. Shelby tried to encourage Elias to be more open with him. He hugged and kissed Elias and told him he loved him,

⁹ Shelby, who was unaware of the letter and unaware Elias did not feel safe with him, believed Edna M. and Edna R. had coached him.

and Elias told him the same. Generally, during unsupervised visits Shelby took Elias to his home where Elias spent time with him, his girlfriend, and their two children. Shelby worked 40 to 47 hours per week, from 8:00 a.m. to 5:00 p.m., and if Elias were placed with him, Shelby's girlfriend would take care of Elias while he worked, until Shelby's mother retired in four months. Elias got along well with the girlfriend.

The opinions of the social worker, Shelby's therapist, and Elias's therapist, as well as the evidence of Shelby's and Elias's blossoming father-son relationship, Elias's relationship with Edna R. and Edna M., and Elias's own feelings and behavior, constitute substantial evidence supporting the juvenile court's finding that returning Elias to Edna R. would entail a substantial risk of detriment to his physical and emotional well-being but placing him with Shelby would not entail such a risk. We accordingly affirm the order placing Elias with Shelby.

DISPOSITION

Order affirmed.

McCONNELL, P. J.

WE CONCUR:

McINTYRE, J.

AARON, J.